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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 398 MISC.

JOHN T. MILLER,

Petitioner,

vs.

STANDARD OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John T. Miller, respectfully prays for a rehearing of the order of this Court dated April 27, 1953, denying his petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BASIC FACTS.

This is an action by a seaman for maintenance and cure in which said seaman made a timely demand for a jury trial by authority of The Great Lakes Statute, 28 U. S. C. A. Sec. 770; Sec. 28 U. S. C. 1873, June 25, 1948, C. 646, 62 Stat. 953. The petitioner's demand for a jury trial under the above statute was denied by the United States District Court for the Northern District of Illinois, Eastern Division.

The Honorable Mr. Justice Black and Mr. Justice Douglas are of the opinion the petition should be granted.

This case is one of general public importance because it involves the cherished right of trial by jury. And the decision below constitutes a misinterpretation of the purpose and effect of the Great Lakes Statute.

Through no fault of your petitioner due to publication difficulties your petitioner's Reply Brief was not received by the Office of the Clerk of the Supreme Court of the United States until four days after this Honorable Court had denied the petition for Writ of Certiorari. The petitioner, libelant found it necessary to make a Reply Brief because the respondent in its Brief in opposition to the Petition for Certiorari either intentionally or carelessly miscited various Federal Court decisions.

Therefore your petitioner prays the indulgence of this Honorable Court in the consideration of the substance of the material the petitioner had prepared for the determination of this Court in the Reply Brief of Petitioner.

It would be difficult to exaggerate the necessity for a decision on the merits of the meaning and effect of the Great Lakes Jury Statute and the interpretation to be given to a cause of action for maintenance and cure, as a means of avoiding constant litigation and relitigation of the same substantial point. This Court has often cautioned that its denial of Petition for Certiorari is not to be construed as a decision on the merits. That being so attorneys will continue to resist the denial of a right to trial by jury until the merits of the Great Lakes Jury Statute involved has been finally adjudicated.

STATEMENT.

It is claimed in the Respondent's Brief, that the rights of a seaman in any given case to maintenance and cure exist regardless of any meeting of the minds. This statement is manifestly untrue, because when the ship owner contracts to employ an individual as a seaman he is, or should be, cognizant of any and all existing laws that become a part of this contract of employment. One of the duties imposed by law is the duty on the part of the ship owner to provide maintenance and cure. Therefore, a ship owner such as the respondent, who contracts with a seaman, is aware or should be aware that he must live up to this agreement imposed by law. The ship owner voluntarily enters into this contract of employment with the seaman, knowing full well the existing laws which become a part of this contract, and therefore the ship owner in effect makes the promise to provide maintenance and cure as part of the contract. No one forces this ship owner into contracting to employ a seaman, but he does so with a desire of promoting his own economic interests. If the ship owner claims that there was no meeting of the minds of the parties, by in effect claiming ignorance of all existing laws affecting a seaman's contract, then the law will step in and imply a contract. This theory is certainly not new in the field of contracts as the law in many instances steps in and rules that if the one party did not realize one of the aspects of his contract, he should have. These cases can hardly be called anything but contract cases. In the case of the seaman this right to maintenance and cure never exists unless it is proven that the relationship of seaman and ship owner exists. And therefore maintenance and cure has its very creation in the contract of employment, and thus becomes a part of the contract of employment between the ship owner and seaman.

The respondent claims that there is no conflict in the opinion of the Court below, and the decisions of the Sixth and Ninth Circuits and various District Courts, because it claims none of the cases cited bring into issue the question of the Great Lakes Jury Trial Statute. The petitioner maintains there is a conflict because the Lower Court found that all elements necessary to place the case under the Great Lakes Statute were established in the record by the petitioner, except the Lower Court found the petitioner's suit for maintenance and cure was not a contract or tort action within the meaning of Section 1873 of the Judicial Code of the United States of 1948. Therefore the only issue the Court of Appeals left to be decided was whether or not maintenance and cure is a contract or tort action and thus covered by the Great Lakes Jury Statute. As the Lower Court based its entire decision on the fact that maintenance and cure is not a contract or tort, other Federal Court's decisions respecting the meaning of maintenance and cure become relevant. The respondent's claim regarding these decisions is absurd to say the least because they themselves in the Lower Court brought into issue the various courts decisions on the meaning of maintenance and cure, and none of their decisions directly involved the Great Lakes Jury Statute.

The respondent's fear that his expense in contesting the rights of seaman might be increased, could be avoided by a more humane handling of seamen's claims. The respondent claims that the ancient prerogatives of admiralty are to be preserved can be best answered by reviewing a history of the many changes that have already taken place in the admiralty practice.

The Admiralty Court procedure is a body of international and substantive and procedural law descended from ancient Mediterranean law.

When the United States became a nation, international maritime trade was essential to its existence. Framers of the Constitution believed that successful American participation in international trade required uniformity of doctrine and procedure in admiralty law. Accordingly, the Constitution vested in the Federal Government power, subsequently interpreted to be exclusive over admiralty suits. To achieve conformity with admiralty courts of other nations, Congress instructed the courts to proceed according to the international Civil Law as it had been developed and modified by the English Admiralty Courts and the Colonial Vice-Admiralty Courts.

Since the initial acceptance of the Civil law, admiralty law has gone through a process of Americanization. The Procedure has been transformed by Congress and the courts from an awkward mine of anglo-admiralty practice to a procedure more suited to the administration of justice in our own Federal Court system. Congress has provided for a mode of proof unlike that of the Civil Law; it has changed the scope of appellate review; it has empowered the admiralty court to grant injunctions; it has provided a jury trial in admiralty; and it has set up limitation of liability proceedings which have no analogue in the Civil Law practice of 1789. The petitioner's claim for the protection of the ancient and logical prerogatives of admiralty has a singular interest among ship owners who might desire to unjustly contest seamen's claims with the security that their contest would involve the minimum of expense.

ARGUMENT.

Point I.

The respondent in commenting on *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, neglected to mention that the case referred to maintenance and cure as a contractual right.

The cases of *Harden v. Gordon*, 11 Fed. Cas. 480, No. 6047; *Cortes v. Baltimore Insular Line*, 287 U. S. 367, and *Calmar S. S. Corp v. Taylor*, 303 U. S. 525, are all relevant to the case at bar because they clearly show the meaning and effect of an action for maintenance and cure. The respondent claims that one experienced individual would be more capable of deciding these cases is in conflict with our entire judicial procedure, which is predicated on reverence for a trial by jury. Of course any change in this Great Lakes Jury statute is a matter of legislation.

When the Courts refer to seamen as "Wards of the Admiralty," they are referring to the fact that Admiralty Law must protect the seaman; therefore an interpretation of this term, such as propounded by respondent, that takes away a right, is not in harmony with the law.

The Lower Court on page 4 of their opinion held that all elements to place this case under the Great Lakes jury statute were established in the records, except they decided that maintenance and cure was not a contract or tort action; therefore the cases that refer to maintenance and cure as a contract or tort do conflict with the Lower Court's holding.

Points II and III.

Runyan v. Great Lakes Dredge & Dock Company, 141 F. 2d 396, which was decided in the Sixth Circuit, describes maintenance and cure as a contract action, and the *City of Avalon*, 156 F. 2d 500, decided by the Ninth

Circuit are also in conflict with the Lower Court's interpretation of an action for maintenance and cure for the same reasons set forth in Point I, above.

The cases cited by petitioner decided by the various District Courts are also relevant for the same reasons as set forth in Point I, of this reply brief. However the respondent has, in referring to *Sperbeck v. A. L. Burbank & Co.*, 88 F. Supp. 623, made a statement in Point 4 of its brief, that falsifies the opinion of the Court in that case.

The respondent's statement in its brief in referring to the *Sperbeck* case is as follows:

> "The opinion discusses the nature of maintenance and cure and reaches no conclusion as to whether it is contractual, delictual or 'something else.' "

While we do not wish to bother this Court with the problem of improper briefing of cases, we do feel that the respondent has so flagrantly misquoted the opinion of the Court that it leaves us with no other alternative.

In order to clarify the matter the following is a direct quotation from the opinion of District Judge Rifkind in the *Sperbeck* case:

> "The second question is whether the claim for maintenance and cure abated on Sperbeck's death. No answer to this question has been provided by the authorities. Counsel inform me that diligent search has not discovered a case directly in point. The argument has therefore taken a turn toward the classification of the claim for maintenance and cure as contractual, delictual or belonging to an independent category. Of that, too there is no clearcut determination. When the legal materials are as plastic as they are on this question the forms of logical deduction are illusory since the desired conclusion is surrepti-

> tiously introduced into the premises. It may as well, therefore, be done candidly. *Preferring to hold that the claim for maintenance and cure does not abate at the death of the seaman entitled thereto, I choose to classify the claim pro hac vice as contractual. Authority for my choice I find in the language of Cortes v. Baltimore Insular Line,* 1932, 287 U. S. 367, 371, 53 S. Ct. 173, 174, 77 L. Ed. 368, *"Contractual it is in the sense that it has its source in a relation which is contractual in origin."* (Pages 625 and 626.)

In answering the remaining portions of the respondent's brief, reference will be made to the case and page number as it appears in respondent's brief.

On page 7 of respondent's brief, it cites the case of *Frank J. Fobert,* 32 F. Supp. 214 (W. D. N. Y. 1940), where the Court held that the Great Lakes Jury Statute is applicable only when navigation is between places in two or more states, each of which is upon one of the Great Lakes or navigable waters connecting them. In the case at bar, the United States Court of Appeals, in their decision after reviewing the facts in the case decided on page 4 of their decision, said in effect, that the respondent's vessel was enrolled and licensed for the coasting trade and was employed in commerce and navigation between places in different states and upon the lakes and navigable waters connecting such lakes.

Respondent cites the case of *Gillet v. Pierce,* 10 Fed. Cas. 388, No. 5437 (E. D. Mich. 1875). This case does not support the respondent's contention because in that case there appeared nowhere in the pleadings that the vessel concerned was enrolled and licensed for the coasting trade. The Court's criticism in this case, of the Great Lakes Jury Statute, should be lightly considered in view of the fact that the Circuit Court of Appeals for the Second Circuit

in the later case of *The Western States,* 159 F. 354 (2 Cir. 1908), clearly upheld the Great Lakes Jury Statute.

The Erie Belle, 20 F. 63 (E. D. Mich. 1883), cited by respondent on page 8 of its brief is another application by the Court of the Great Lakes Jury Statute.

On page 8 of respondent's brief it claims that in the case of *The Western States,* 159 F. 354, that the decree of the trial judge reducing the jury's verdict of $15,000 to $5,000 was affirmed. This statement is incorrect which is readily seen by a cursory reading of the decision of the Second Circuit on appeal. Upon appeal, the Second Circuit held the jury's verdict to be binding upon the Trial Judge, *but upon the theory that appeals in admiralty are trials de novo,* the Second Circuit held that it had the power to, and did assess damages at $5,000.00. Professor James William Moore in *Moore's Federal Practice,* Second edition, Volume V (1951) page 277, comments on *The Western States* decision and the *Genesee Chief* (1851), 53 U. S. (12 How.) 443, 13 L. ed. 1058:

> "From the arguments before the Supreme Court in The Genesee Chief and the discussion of the Court in that case, it seems clear that Congress intended to grant a jury trial as of right because of assumed constitutional necessity, since it thought, albeit erroneously, that it was operating under the commerce power. What Congress granted then was jury trial commensurate to jury trial under the Seventh Amendment even though that Amendment in fact does not apply. The Court in the Genesee Chief states that Congress had altered the 'mode of procedure' in admiralty by the introduction of trial by jury therein. Did Congress intend to alter the 'mode of procedure' only at the Trial Court level? Apparently the Second Circuit (in the Western States) case thought so for it exercised its customary ad-

miralty appellate powers under the trial de novo theory relative to admiralty appeals. With deference, we disagree. It seems odd to believe that Congress intended to give with one hand at the trial court level what could be taken away at the appellate level, when Congress thought it was operating subject to the limitations of the Seventh Amendment. Presumably it intended to give a jury trial commensurate to that guaranteed by the Seventh Amendment. From this it would follow that the verdict of a jury in a case arising in contract or tort under 28 USC 1873, is not advisory, but has the same effect at the trial and appellate levels as a verdict in a common law action; and any fact determined by the verdict may not be re-examined, at either level, other, than according to the rules of the common law."

On page 9 of the respondent's brief it is forced to admit that the case of *Sellon v. Great Lakes Transit Corporation,* 87 F. 2d 708 (2 Cir. 1937), does involve an action for maintenance and cure and there was a jury trial granted under the Great Lakes Jury Statute. In a desperate attempt to avoid the effect of this decision, the respondent claims that this opinion does not show whether there had been any objection to the jury trial.

On page 9 of the respondent's brief it cites the case of *Dryden v. Ocean Accident & Guarantee Corp.,* 138 F. 2d 291, 293: This case was decided by the same Court that this appeal is taken from. That case involved in a sense the protection of a seaman's right to maintenance and cure. In that case the defendant employer was seeking to have its insurer defend a seaman's suit for maintenance and cure on the grounds that the seaman's claim was a "liability imposed by law," and therefore covered by the insurance policy. The Court in effect held that

maintenance and cure was a contract but that it was also a "liability imposed by law." The Court discussed the duty of the ship owner to provide maintenance and cure, but the actual decision merely held that the clause in the insurance policy covering "liability imposed by law," was sufficiently broad enough to cover an action for maintenance and cure. But the Court of Appeals for the Seventh Circuit in the case at bar have digressed considerably from their earlier decision in holding that maintenance and cure is not a matter of contract or tort.

The respondent in its brief relies heavily on the case of *Gillet v. Pierce,* 10 Fed. Cas. 388, No. 5437 (E. D. Mich. 1875), where a jury trial was denied because the pleadings did not show the vessel was enrolled and licensed, for the coasting trade. This case cannot possibly support their contention because the lower court in the case at bar, found that the vessel was enrolled and licensed for the coasting trade. In fact, the case supports the petitioner's contention by implying that a jury trial would have been granted in the *Gillet* case, if the pleadings showed that the vessel was licensed for the coasting trade. The criticisms of the Great Lakes Jury Statute by the Court in the *Gillet* case above, do not in any way affect its application or legality. If any changes are to be made in the Great Lakes Statute it is a matter for Congress to take into consideration, and criticisms of this Statute should be channeled in that direction. Congress has seen fit to keep this legislation on the books and for no other purpose but to protect seamen. It certainly cannot be claimed that this legislation was enacted to protect individuals other than seamen, to the exclusion of seamen. It was intended by Congress to encompass all possible claims of seamen by using the words Contract or Tort.

The respondent in its brief cannot understand why there are so few cases involving the Great Lakes Jury Trial Statute. This fact can best be explained from the fact that seamen are quite aware of the maritime laws' rigid protection of their rights. And, therefore, in many instances feel more secure when the decision rests in the admiralty courts. The Courts have made it clear that they intend to protect these rights. The seaman, being an integral part of the International Maritime trade, which is essential to the United States, must be given every protection necessary to his survival.

Another reason why very few cases regarding the Great Lakes Statute have been presented is because Congress, desiring to more fully protect the seaman, enacted the Merchant Marine (Jones) Act of 1920; 46 USC 688. The cases hold that the Jones Act claim and the claim for maintenance and cure may be joined in one action. Therefore, as the Jones Act provides for a trial by jury, the seaman may demand a jury if he so desires. Thus there is no need to rely on the Great Lakes Jury Statute, in most instances. But in the case at bar, as the Jones Act claim was barred, the seaman had to enforce his rights for maintenance and cure in admiralty, and after showing that all the elements necessary to place the case under the Great Lakes Jury Statute were present he demanded a trial by jury. Granted, in many instances the facts that place a case under the Great Lakes Statute are not present, and in most instances, the seaman proceeds under the Jones Act, 46 USCA 688, but still, when a seaman's case meets the requirements of the Great Lakes Statute, and he so desires to have the case tried by a jury, he should be allowed this right, given him by law.

Legislation favoring seamen is predicated on the philosophy set forth in one of the earliest cases on the subject of maintenance and cure:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labors; they are generally poor and friendless, and acquire habits of gross indulgence, carelessness and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness." *Harden v. Gordon,* 2 Mason 541, 11 Fed. Cas. 480-9, 10.

As previously mentioned the petitioner's contention finds support in the case of *Cortes, Administrator v. Baltimore Insular Line, Inc.,* 287 U. S. 367, where Justice Cardozo said the duty to provide maintenance and cure is contractual in the sense that it has a source in a relation which is contractual in origin. The Court further stated in that case:

> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more."

Quite notably the respondent's brief is absent of any explanation of the opinion in the *Cortes* case. The *Cortes* case was cited as authority in *Sperbeck v. A. L. Burbank & Co.,* 88 F. Supp. 623, when that case also held that maintenance and cure was a contract.

CONCLUSION.

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying his petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit be reheard and vacated and that the petition be granted.

Dated: May 11, 1953.

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Certificate of Counsel.

The undersigned, S. Eldridge Sampliner, attorney for Petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said petition for rehearing is not interposed for delay.

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